NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 13 ▪ NUMBER 1 ▪ JUNE 2015

SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

June 2015

The mode of citation of this journal is: (2015) 13 NZJPIL (page)

The previous issue of this journal was volume 12 number 2, December 2014

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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The New Thinking on Sustainability Conference at which preliminary versions of these articles were originally presented was made possible with the generous support of the German Australian Pacific Lawyers Association, the New Zealand Law Foundation and Victoria University of Wellington.

SUSTAINABILITY ALTERNATIVES: A GERMAN-NEW ZEALAND PERSPECTIVE

Klaus Bosselmann*

Sustainability must be a grundnorm or fundamental principle of law in a similar way as freedom, equality, justice and the rule of law. To give contour to that grundnorm the author analyses sustainability alternatives from two angles. One is sustainability as the alternative to the current collapse of financial, economic and ecological systems. The other is a comparison between New Zealand and Germany in regard to their treatment and response to sustainability. He concludes that there are many ways to give legal expression and political weight to the grundnorm but that the best starting-point remains the Earth Charter which was conceived in the spirit of the Brundtland Report.

I INTRODUCTION

In 1940, Woody Guthrie wrote the legendary song *This Land is Your Land*. But all recordings of the song (from 1944) left out two important verses—one on property rights and one on hunger in America—until Pete Seeger came along and included them again. Pete Seeger, who died in early 2014, sang all verses all the time, he told the full story of America and was, in my view, one of America's true heroes. I want to dedicate my talk to him and here is why. The missing verse that Pete never forgot goes:[1]

> Was a big high wall there that tried to stop me,
> Was a great big sign that said, "Private Property",
> But on the other side, it didn't say nothing,
> That side was made for you and me.

* Professor, University of Auckland, Faculty of Law.

This article was presented as a keynote address at the "New Thinking on Sustainability" conference held at Victoria University of Wellington in February 2014.

1 Nick Spitzer "The Story of Woddy Guthrie's 'The Land is Your Land'" (15 February 2012) NPR Music <www.npr.org>.

This points to the big divide between private property and the commons. In many ways, it sums up the predicament of our time: property rights have taken over the land that was supposed to be for you and me—in America, in Germany, in New Zealand, the world over. The enclosure of the commons is the number one obstacle that prevents us from building a sustainable future based on the protection of the commons that we all share. So, we need to tackle property rights upfront. They are not absolute and can no longer in themselves determine what is and what isn't possible for environmental law and governance. Rather they need to be re-defined in the social and ecological context that they are operating in.

This is no new discovery. In the 1980s in Germany we had a vivid political debate about the damaging effects of private property and a very promising constitutional discourse on ecological limitations to property rights.[2] But this was the 1980s, the green decade when the Brundtland Report was written and when both Germany and New Zealand embarked on a major reform of their systems of environmental governance.[3] I am lucky enough to have been involved in both these developments.

When we started the German Greens in 1980, we used the 1975 manifesto "Beyond Tomorrow" of the New Zealand Values Party as a key reference document.[4] The Values Party was the world's first alternative party, incidentally established here at Victoria University in May 1972. When we started the Green Party of Aotearoa New Zealand in March 1990, I gave a talk entitled "Deep Foundations – Green Principles" based on my German experience.[5] My message was that a paradigm shift is occurring with profound changes in the way we govern ourselves. I described the Green movement as the vanguard of global ecological consciousness and predicted a general greening of policies, laws and governance in the 1990s.

II FAILURES OF STATES, GOVERNMENTS AND LAWYERS

How wrong I was, or shall we say premature. The world has gone backwards big time. Governments have never acted upon their sustainability commitments resulting from the 1992 Rio Earth Summit. Instead, we have seen an accelerated deterioration of planetary systems. In just 20 years, Greenhouse gases went up by 25 per cent, species extinction up by 20 per cent and rainforests have been decimated by the size of Germany and New Zealand taken together. During the same period, the gap between rich and poor has dramatically increased. Today, the world's richest 85 people

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2 See for example Klaus Bosselmann *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Aldershot, 2008) at 138–143.

3 *Report of the World Commission on Environment and Development: Our Common Future* A/42/427 (1987).

4 Global Greens "Beyond Tomorrow (1975) – New Zealand Values Party" <www.globalgreens.org>.

5 Klaus Bosselmann "Deep Foundations – Green Principles" (Key Note Conference, Green Politics for the 1990s, Nelson, 2 March 1990).

own as much as the bottom half of the world population, that is, 3.5 billion people.[6] In New Zealand, the top one per cent own three times as much as the bottom half of our population. Recently, President Obama described such inequalities as "the defining challenge of our time".[7]Pope Francis explained:[8]

> As long as the problems of the poor are not radically resolved by rejecting the absolute autonomy of markets and financial speculation and by attacking the structural causes of inequality, no solution will be found for the world's problems or, for that matter, to any problems.

According to states and governments, the formula for solving these problems is sustainable development. However, it is a myth to believe that governments are interested in sustainable development, no matter what our political leaders might be saying. It is not just lack of commitment and political will. The reasons for, what has widely been described as state failure (*Staatsversagen*),[9] are deeper, they are systemic. States have been incapable and leaders incapacitated to respond to the challenge of sustainable development.

Recently, I met with Jim MacNeill, former Secretary-General of the United Nations Commission for Environment and Development and lead author of the 1987 Brundtland Report.[10] He confirmed my suspicion that, right from the start, governments and multinational companies rejected the key recommendation of the Brundtland Report, namely to organise social and economic development within the limits of nature. Instead, they cherry-picked one sentence of the Report ("development that meets the needs of the present without compromising the ability of future generations to meet their own needs") to reconcile it with the traditional paradigm of economic growth with environmental protection as an add-on.[11] Understood in this way, sustainable development made its world career precisely because it is so meaningless. From my perspective, the greatest failure of legal scholars was to not criticise this ideologically motivated behaviour of states strongly enough. In the main, legal scholarship is too entangled in the myths of neutrality of the state and value-neutral law to appreciate the importance of ecological jurisprudence.

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6 Ricardo Fuentes-Nieva and Nick Galasso *Working for the few: Political capture and economic inequality* (Oxfam International, 20 January 2014) at 2; calculations based on Credit Suisse *Global Wealth Report 2013*; see also Credit Suisse *Global Wealth Report 2015* at 13.

7 Jim Newell "Obama: Income Inequality is the 'Defining Challenge of our Time'" *The Guardian* (online ed, London, 4 December 2013).

8 Naomi O'Leary "Factbox – Key Quotes: Pope Francis Condemns Unfettered Capitalism *Reuters UK* (online ed, 26 November 2013).

9 Martin Janicke *Staatsversagen: Die Ohnmacht der Politik in der Industriegesellschaft* (Piper, Munich, 1986).

10 *Report of the World Commission on Environment and Development: Our Common Future*, above n 3.

11 At ch 2, [1].

One of the pioneers of environmental law, the late Staffan Westerlund of the University of Uppsala, went so far as to say that the entire academic discipline of environmental law over the last 30 years has failed. Rather than looking at sustainability from the perspective of law, we should have looked at the law from the perspective of sustainability. This paradigm shift has never entered mainstream environmental law scholarship. According to Westerlund, the central reference point of environmental law is not some undefined "environment" or "sustainable development", but sustainability with ecological integrity at its core.[12]

Closer to home, Doug Fisher, one of Australasia's pioneers of environmental law and former Dean here at Victoria University of Wellington Law School, makes the same point: in his new book *Legal Reasoning in Environmental Law*.[13] Fisher argues that politicians, administrators and judges reach decisions without a specific environmental point of commencement. Rather, they readily employ the general criteria of human well-being and economic prosperity. The environment appears as an unknown entity, too abstract and not nearly as well defined as human rights or property rights. As a consequence, vague environmental interests loose against hard economic interests. The book concludes with a plea for "processes of legal reasoning which reflect the fundamental *grundnorms* of the system – the rule of law in general and sustainability in the context of environmental governance".[14] Spot on!

III SUSTAINABILITY ALTERNATIVES

Sustainability must be a *grundnorm* or fundamental principle of law in a similar way as freedom, equality, justice and the rule of law.[15] A *grundnorm* can be expressed in a constitution (in whatever form, written or unwritten), it can be a commonly shared value or it can be a mere assumption. The point is that a *grundnorm* "provides navigational coordinates by which politicians, judges and officials can distinguish acceptable from unacceptable public action".[16] These navigational coordinates are missing in our system of environmental law and governance; environmental law scholars and practitioners have a lot to do with this. They have not sufficiently insisted on the *grundnorm* character of sustainability. This exactly maps out what the Earth Law Alliance of Aotearoa should work on.

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12 Staffan Westerlund "Theory for Sustainable Development Towards or Against?" in Hans Christian Bugge and Christina Voigt (eds) *Sustainable Development in International and National Law* (Europe Law Publishing, Groningen, 2008) 48 at 65.

13 Doug Fisher *Legal Reasoning in Environmental Law: A Study of Structure, Form and Language* (Edward Elgar, Cheltenham, 2013).

14 At 433.

15 Klaus Bosselmann "Grounding the Rule of Law" in Christina Voigt (ed) *Rule of Law for Nature: Basic Issues and New Developments in Environmental Law* (Cambridge University Press, Cambridge, 2013) 75. ""

16 Philip Joseph "The Rule of Law: Foundational Norm" in Richard Ekins (ed) *Modern Challenges of the Rule of Law* (Lexis Nexis, Wellington, 2011) 47 at 48.'

I understand my topic, sustainability alternatives, to mean two things. One is that sustainability is *the* alternative to the current collapse of financial, economic and ecological systems. It has always been *the* alternative. The term comes from the German word *Nachhaltigkeit* which last year celebrated its 300th birthday with hundreds of public events in Germany (although, actually, it had been used in German legislation since 1442).[17] In his book *Sylvicultura economica*, published in 1713, economist and forest manager Carl von Carlowitz described *Nachhaltigkeit* as the most essential principle for a flourishing economy and society. This was a widely accepted truth among economists back then, and sadly has been forgotten by modern economists.

The best definition for *Nachhaltigkeit*, however, can be found in the 1809 *Encyclopedia of the German Language* by Joachim Heinrich Campe.[18] He gave this notable definition: "*Nachhalt ist das, woran man sich hält, wenn alles andere nicht mehr hält*" (sustainability is what you hold on to when nothing else holds any longer). This precisely describes our current situation: sustainability is the antithesis of collapse.

The second thing that I associate with my topic is a comparison between Germany and New Zealand. There is a German alternative and a New Zealand alternative, but each can learn a great deal from the other. In fact, when we see how both countries are trying to meet the challenge of sustainability, we can detect a pattern, a search to make sustainability relevant to all public policy and law. In New Zealand this search has focused on the Resource Management Act 1991; in Germany the focus was and continues to be on constitutional reform.

Essentially I will argue here that we need a constitutional moment. Such a moment occurs when there are unusually high levels of sustained popular attention on questions of constitutional significance.

IV GERMANY'S SUSTAINABILITY DISCOURSE

West Germany had such a constitutional moment during the 1980s when the Green movement began to articulate the legal implications of ecocentrism. This culminated in a constitutional initiative in 1985–1989 to transform the German *Grundgesetz* (Basic law) from the traditional anthropocentric to a new ecocentric perspective. At its core was the question whether ecological realities require a redefinition of human rights and a special obligation of the state to protect the environment, 'for its

17 See generally Ulrich Grober *Sustainability: A Cultural History* (Green Books, Devon, 2010).

18 As quoted in Ulrich Grober *Die Entdeckung der Nachhaltigkeit. Kulturgeschichte eines Begriffs*, (Verlag Antje Kunstmann, München, 2010) at 148. Campe incidentally was the teacher of Alexander von Humboldt, the great explorer and ecologist, companion of Georg Forster and James Cook, name giver for a mountain range in the New Zealand Southern Alps and brother of Wilhelm von Humboldt, founder of the modern idea of the university (that is, freedom of research, identity of teaching and research).

own sake,' as well as for future generations. We[19] proposed that ecological boundaries should define human rights such as the right of liberty, freedom of research and teaching, and particularly the concept of property. In essence, the use of natural resources would no longer be protected, but only their *sustainable* use. Reflecting the precautionary principle, the onus would be on a person or company to demonstrate that their proposed activity would not negatively affect the integrity of relevant ecosystems. Remarkably, our proposals were supported by the *Bundesrat*, the Upper House of the *Länder*/states and triggered a full review by the Joint Constitutional Commission.[20] The Commission did not resolve these issues and instead called for a wider public dialogue precisely because they are so important:[21]

> The question of either an anthropocentric or ecocentric approach to the constitution is of such fundamental importance, that the Commission did not see itself as mandated to answer it. Instead the Commission calls for a wide expert and public dialogue before considering such a change.

Then, in 1989, The Wall came down and German unification ended the debate, at least for a while. In its 1993 Report, the Constitutional Commission reversed its call for public dialogue and declared the matter closed:[22]

> The environment cannot be subject of protection in its own right, especially cannot claim unilateral priority. Rather it needs to be seen in the context of multifaceted situations of conflict, for example, with economic growth, industrial development, creation of jobs, housing, energy supply or transport services. … There was no support for the introduction of ecological limitations to individual fundamental rights, for example, property.

This was in stark contrast to what civil society demanded. In 1991, a group of university professors, activists and parliamentarians had symbolically adopted a "New Constitution for Germany"[23] in the historic Paulskirche in Frankfurt (where the first German constitution was adopted in 1848). This would have been the best constitution ever written: based on the fundamental principle of sustainability, it included all our proposals on ecological limitations of human rights and property rights and a state obligation to protect the environment for its own sake.

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19 *Institut für Umweltrecht* (Institute for Environmental Law) and *Verein für Umweltrecht* (Association for Environmental Law).

20 Bosselmann, above n 2, at 138; and Klaus Bosselmann *Ökologische Grundrechte* (Nomos, Baden- Baden, 1998) at 80–126.

21 Bosselmann, above n 2, at 138.

22 At 138.

23 Kuratorium für einen demokratisch verfaßten Bund deutscher Länder *Vom Grundgesetz zur deutschen Verfassung. Denkschrift und Vergassungsentwurf* (Nomos, Baden-Baden, 1991). See also Bosselmann *Ökologische Grundrechte*, above n 20, at 98.

Nevertheless, political pressure on the Government continued and the 1994 and 2002 amendments to the *Grundgesetz* reflect a notable move away from anthropocentrism. Article 20a, for example, established a new state obligation: The state, also in its responsibility for future generations, protects the natural foundations of life: not just *human* life. This followed engaged parliamentary debate on anthropocentrism versus ecocentrism.

It was the same political pressure of the Green movement that brought about the now famous *Energiewende*/energy turnaround. The *Energiewende* has been described as the biggest infrastructure project since post-second-world-war reconstruction. It is very much driven by Germany's desire for technological innovation and competitiveness. At its roots however, is not economics, but the peace and anti-nuclear movement of the 1960s and 1970s, the Green movement since the 1980s and a general cultural shift towards sustainability. This cultural shift is obvious for everyone who lives in Germany or visits the country.

In this sense, past and present constitutional discourses are a reflection of cultural change. However, the reverse is also true. As we have learned in the 1980s, sustainability affects fundamental values in society and inevitably looks for constitutional expressions. From my German experience, I can only hope that the recent constitutional review in New Zealand doesn't fizzle out in some rearrangements of electoral cycles, Māori representation or the Bill of Rights. We need to think a lot harder about our history (Te Tiriti o Waitangi/The Treaty of Waitangi), our evolving identity as a Pacific nation in a global neighbourhood and the kind of future we want for our children and children's children. These are all issues of sustainability that need to be addressed and articulated in a constitutional context.

Like the German *Grundgesetz*, virtually all European constitutions have been amended in the light of sustainability challenges. Worldwide, 147 countries have enacted constitutional provisions for environmental rights and responsibilities. Approximately 100 countries have incorporated a state obligation to protect the environment; of those 60 national constitutions also recognise a human right to a decent environment, while 60 constitutions include collective and individual responsibilities for the environment.[24] The most ambitious of all is in the Pachamama approach of some Latin American constitutions, especially Bolivia's.[25]

V NEW ZEALAND'S SUSTAINABILITY DISCOURSE

New Zealand has none of this. We are blissfully different and follow our own way.[26] Instead, we stumble through traditions, conventions, statutes, court decisions and changing governments without

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24 Bosselmann *Ökologische Grundrechte*, above n 20, at 125–127.

25 Constitution of Bolivia 2009. See generally Klaus Bosselmann "Global Environmental Constitutionalism: Mapping the Terrain" (2015) 21 *Widener Law Review* 171.

26 I say "way", not "direction", as I don't think we have got one yet.

really knowing what our firm commitments are. I doubt that we have any noticeable national commitment or cultural shift towards sustainability.

To New Zealand's credit, or more precisely to Sir Geoffrey Palmer's credit, ours was the first country in the world to incorporate sustainability in its central environmental law. The conceptual approach in Part II of the Resource Management Act 1991 (the RMA) was much admired around the world, however, it didn't last very long. Initially, the Environment Court (also a world' first) followed an environmental bottom lines approach that acknowledged the overall objective of ecological integrity. But then, in 1997, Principal Judge Sheppard in *North Shore City Council v Auckland Regional Council* opened the door to what became known as the overall broad judgment approach.[27] He probably did not intend a complete turnaround when he found that the ecological aspects in s 5(2)(a)–(c)still need some judgment of scale or proportion. A test of proportionality is, after all, part of any process of legal decision-making. But the door was opened and ever since courts have happily employed the overall broad judgment approach that they are so used to. To accept an overarching sustainability objective just seemed too revolutionary.

In the meantime, successive governments did their best to simplify and streamline the RMA to suit the overarching concern for economic growth and competitiveness. Since 1991, the RMA has undergone 17 significant amendments "to keep up with changing needs and circumstances" as the website of the Ministry for the Environment puts it.[28] Essentially, the intent of the RMA, to promote sustainable management, has been eroded beyond recognition. The Resource Management (Simplifying and Streamlining) Act 2009 gave the Minister greater powers to circumvent or speed-up consent procedures in an attempt to "avoid judicial oversight and secure the achievement of Government economic policy" (as Sir Geoffrey Palmer observed in his recent legal opinion for Fish and Game New Zealand).[29] The 2013 RMA Amendment Act went a step further. Section 32 of the RMA historically ensured that local councils have the prime responsibility for achieving the RMA's objectives. This power has now been shifted to central government which is very prescriptive about the role of councils. They are now required to:[30]

> … identify and assess the benefits and costs of the environmental, economic, social, and cultural effects … including the opportunities for—
>
> (i) economic growth that are anticipated to be provided or reduced; and
>
> (ii) employment that are anticipated to be provided or reduced; …

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27 *North Shore City Council v Auckland Regional Council* [1994] NZRMA 521 (NZEnvC) at 526.

28 Ministry for the Environment "List of All RMA Amendment Acts" <www.mfe.govt.nz>.

29 Geoffrey Palmer "Protecting New Zealand's Environment: An Analysis of the Government's Proposed Freshwater Management and Resource Management Act 1991 Reforms" (September 2013) Fish and Game New Zealand <www.fishandgame.org.nz> at 27.

30 Section 32(2)(a).

This reference to growth and employment signals a new direction, away from the environmental effects-based approach of the RMA, towards a pro-development approach aiming for growth at the expense of sustainability.

We have to thank the Government for being so outspoken on this change of direction. Amy Adam's 2013 discussion document explicitly justifies the need for reform on the grounds that:[31]

> The focus of the RMA has shifted too far towards avoiding effects on the environment and … too little emphasis is being placed on using planning to deliver positive outcomes.

The RMA has been "too costly and time-consuming" and needs to be closely aligned to the Government's "Business Growth Agenda".[32] To this end, a new s 7 would actually prescribe the "overall broad judgment" approach and emphasise "the benefits of efficient use and development of natural resources" as a key concern,[33] but on the other hand exclude any consideration of "the ethic of stewardship", "intrinsic values of ecosystems" and other principles underpinning the Act's original purpose.[34]

Intentionally or not, the current RMA reforms are sacrificing sustainability and local democracy on the altar of neo-liberal economics. We may end up with an Act that, in the guise of sustainable management, promotes growth and development as if the challenge of sustainability never existed.

We can speculate about the Government's political intentions, however, the main problem is systemic. By definition, sustainability requires a long-term commitment that cannot be altered to suit short-term interests. With the RMA's original purpose now becoming illusionary, New Zealand is falling into a trap. The trap of pragmatism and lack of concept, also known as parliamentary supremacy, and it is of our own making. On first appearance, parliamentary supremacy has the advantage of better democratic control and reversibility over constitutional supremacy. The problems start, however, when successive governments either build up contradictory and messy laws or when they chip away at core principles and concepts that once guided the law. The latter seems to be the case with sustainability. Entrenchment of this principle would have avoided, or at least slowed, its current erosion.

We are the last country on Earth that continues to believe in the purity of Diceyan parliamentary sovereignty. Even the UK's Parliament has partially transferred its supremacy to constitutional control by the European Union.

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31 Ministry for the Environment *Improving our Resource Management System* (Discussion Document, February 2013) at 12.

32 At 27 and 30.

33 At 36.

34 Resource Management Act, s 7.

If we in New Zealand ever needed evidence for a major constitutional overhaul, the plight of the RMA shows how fragile fundamental principles are when they are not entrenched. Other examples include ongoing uncertainties around civil rights, the absence of a defined concept of property or the absence of clearly defined human rights that makes it relatively easy to come up with awkward ideas such as the three-strikes legislation, the cutting back on asylum rights or being oblivious to child poverty. Certainly alarming was the 2013 amendment of the Crown Minerals Act 1991 removing the right to protest to enable undisturbed oil exploration.[35] In February 2014, the Government announced legislation to change the governance settings for universities.[36] Essentially, University Councils are now likely to change from democratic bodies to corporate-style management committees, a clear attack on democracy of the university and academic freedom: two key pillars of any free, democratic society.

These and many other instances of tampering with fundamental principles and ""rights suggest that we may be losing the safeguards that make democracy possible in the first place. What's more, we as the sovereign people are not in charge of our own destiny. We have not authored our constitution, simply inherited it and find it now increasingly hard to oppose the commercialisation and enclosure of our commons.

VI ECOLOGICAL INTEGRITY AS A GRUNDNORM

I am not writing to promote a written constitution as a panacea for restoring democracy, civil rights and sustainability. It is not; these things depend on an active citizenry and do not necessarily require a single-document constitution. But what we need now, I believe, is a constitutional moment, a moment where we pause and ask ourselves whether we as a society really want to continue down this path of erosion. If it is true what many commentators say, that our governments, whether in New Zealand, in Germany or wherever, are more in a mode of crisis management rather than addressing the underlying root causes, then we need to remind ourselves that the buck stops with us as citizens. We are the *demos*, we are ultimately in charge, not the *kratos*, and must provide the leadership that governments are obviously lacking. Nothing seems more at risk than our prospects for a sustainable future. Remember, sustainability is "what you hold on to when nothing else holds any longer".[37]

Most of all, we should look over the shoulder of politicians and constantly remind them of the ethical implications of what they are doing.

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35 Matthew McMenamin *Protest at Sea: An analysis of the Crown Minerals Amendment Act 2013* (2013) 8 HRR 2.

36 Universities New Zealand "Governance changes will undermine role of universities" (16 February 2014) <www.universitiesnz.ac.nz>.

37 See Grober, above n 18.

Drawing from the analysis of leading American climate ethicist Donald Brown, public policy has become so dominated by neo-classical economics that questions of ethics and morality are kept off the table. For the most part, this is done through two kinds of arguments. First, the goal of all policy is welfare maximisation within given markets, in which all values are determined by the "willingness to pay" measured in money. Second, no government involvement in free markets is ever justifiable unless there are high levels of scientific proof of some serious market failure with undeniable serious environmental impacts. This puts the stakes so high that only overwhelming evidence will result in some action. Even if there is overwhelming evidence, such as for climate change, any action has to pass a utility test usually in the form of cost-benefit analysis. Instead of setting some non-negotiable ethical standards, governments aim for some middle-ground between market needs and environmental needs.

But is there really a middle-ground? *In Gefahr und großer Not bringt der Mittelweg den Tod* (Friedrich von Logau), that is, in danger and great need the middle-ground spells death. Therefore, the first issue is to recognise environmental needs as an absolute and to help people (fellow citizens and politicians) to see the hidden ethical issues in how policy is framed. The wrongs and rights of policy decisions can never be fully addressed through cost-benefit analysis, but need some ethical benchmark. This is not new, but has been consistently overlooked with respect to ecological sustainability. If the benefit is saving human lives, governments quite readily accept high expenditure, for example, in the areas of public health or traffic security. The reason is that human life and well-being are protected as human rights and constitute non-negotiable bottom lines. In a similar vein, the preservation and restoration of ecological systems is literally lifesaving, at least in the long run, and should be recognised as a non-negotiable bottom line.

Environmental laws have, for the most part, completely lacked such a bottom line. They usually speak of the environment as a general concern or they focus on individual environmental aspects (for example water and biodiversity) without defining them to a degree that enables decision-makers to draw the line between acceptable and unacceptable public action. Yet, a clear definition is readily available, the integrity of ecological systems as the core of sustainability.

The concept of ecological integrity has its origins in the 1972 United States Clean Water Act and in the 1974 Great Lakes Water Quality Agreement between Canada and the United States. It has since been used in conservation legislation in North America and Europe, but not in New Zealand. We can say that the RMA's definition of its purpose in s 5(2) comes close to it if understood correctly (as was the case back then in the mid-1990s). We can also find express reference to the integrity concept in annual reports of the Department of Conservation. Until 2009, the Department of Conservation consistently described the central "outcome" of its work in this way:[38]

38 Department of Conservation *Annual Report for the year ended 30 June 2009* (September 2009) at 23.

> The aim is to, as far as possible, maintain or restore marine, terrestrial and freshwater sites on public conservation lands and waters to a healthy, natural functioning condition. This condition is described as "ecological integrity".

However, since then the annual reports have shifted to utilitarian language. References to ecological integrity have been replaced with the notion "environmental, social and economic benefits from healthy functioning ecosystems".[39]

The concept of ecological integrity is well known in international environmental law. In fact, no less than 23 international soft and hard law agreements contain specific reference to this concept. The first of such agreements was the Convention on the Conservation of Antarctic Marine Living Resources adopted in 1980, which recognised in its preamble, the importance of "protecting the integrity of the ecosystem of the seas surrounding Antarctica".[40] Another example is the preamble of 1992 Rio Declaration on Environment and Development which calls for "working towards international agreements which respect the interests of all and protect the *integrity* of the global environmental and developmental system".[41] Then Principle 7 of the Rio Declaration which states that: "[s]tates shall cooperate in a spirit of global partnership to conserve, protect and restore the health and *integrity* of the Earth's ecosystem."[42] This is repeated in key documents such as Agenda 21 or the 2002 Johannesburg Declaration.[43] Even the 2012 Rio+20 outcome document *The Future We Want,* widely perceived as unambitious and weak, calls for holistic and integrated approaches to sustainable development to guide humanity for restoring the health and *integrity* of the Earth's ecosystem.[44]

Finally, the Brundtland Report itself described the integrity of the natural system as the basic condition for "the survival of life on Earth" and in this way described the core idea behind sustainability as a prerequisite for development.[45]

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39 Outcome statements in the Annual Reports 2010–2014; see, for example, Department of Conservation, *Annual Report for the year ended 30 June 2014* (September 2014) at 9.

40 Convention on the Conservation of Antarctic Marine Living Resources 1329 UNTS 47 (opened for signature 20 May 1980, entered into force 7 April 1980) at preamble.

41 *Rio Declaration on Environment and Development* A/CONF 151/26 (Vol I) (1992) at preamble.

42 Principle 7.

43 *United Nations Conference on Environment and Development: Agenda 21* A/CONF 151/26 (Vol II) (1992) and *Johannesburg Declaration on Sustainable Development* A/CONF 199/20 (2002).

44 *The Future We Want* GA Res 66/288 A/RES/66/288 (2012) at [40].

45 World Commission on Environment and Development, above n 3, at [23]: "Nature is bountiful, but it is also fragile and finely balanced. There are thresholds that cannot be crossed without endangering the basic integrity of the system. Today we are close to many of these thresholds; we must be ever mindful of the risk of endangering the survival of life on Earth."

Applying the usual standards for the recognition of concepts as international law, we can say that the repeated and consistent references to ecological integrity amount to an emerging fundamental goal or *grundnorm* of international environmental law.[46] But even independent of any legal status under international law, the *grundnorm* quality of ecological integrity should be without dispute. Surely, no one would doubt the fundamental importance of keeping the Earth's life-supporting systems intact.

VII CONCLUSION

There are many ways to give legal expression and political weight to this *grundnorm.* Perhaps the best starting-point remains the Earth Charter which was conceived in the spirit of the Brundtland Report.[47] Key members of the Commission such as Jim MacNeill and Maurice Strong went on to initiate an Earth Charter to complete unfinished business of states following the 1992 Earth Summit. The eventual adoption of the Earth Charter in June 2000 in the Peace Palace in The Hague marked an historical event. For the first time, global civil society found its own, independent voice and formulated the ethical, legal and constitutional framework for global governance. No global agreement has been so inclusive in terms of participating people, organisations, religions and cultures and in terms of shared values and principles. At the core of the Earth Charter stands the covenantal plea to respect Earth and life in all its diversity, to care for the community of life and to protect and restore the integrity of Earth's ecological systems.

The Earth Charter has been endorsed by a number of states and many thousands of organisations, local communities, universities and so on. Yet, the main challenge is still ahead of us: how to implement the Earth Charter's principles in constitutions, laws and policies and, most importantly, in the heads and hearts of those in power.

As free market ideology still dominates, governments do not see the protection of our global, national and local commons as a priority. But ecological rationality trumps economic rationality. Markets can only ever operate in social and environmental spaces. They need investors, producers, workers, consumers and natural resources, who all in turn depend on the availability of ecological systems. As we are overstepping planetary boundaries and damaging the integrity of the Earth's systems, markets would be foolish to keep ignoring them. Yet, they are ecologically blind and it is here where governments must step in: give the market what the market needs, but stop market players from abusing the commons that belong to all of us.

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46 Rakhyun Kim and Klaus Bosselmann "International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements" (2013) 2 TEL 285.

47 Earth Charter Commission "The Earth Charter" Earth Charter International <www.earthcharter inaction.org>.

Many consequences follow from this simple insight, for example, trusteeship functions that states must adopt with respect to the global commons,[48] environmental rights that trump property rights or, in the case of New Zealand, a proper constitution.

48 Klaus Bosselmann *Earth Governance: Trusteeship of the Global Commons* (Edward Elgar, Cheltenham, 2015).

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